

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DWAYNE E. GRAY,)	
<i>Plaintiff,</i>)	
)	
vs.)	1:11-cv-01575-JMS-DKL
)	
CONESTOGA TITLE COMPANY; AMERICAN)	
MODERN INSURANCE GROUP; CHASE HOME)	
FINANCE, LLC; SAFEGUARD PROPERTIES,)	
LLC; JT PROPERTY SERVICES, INC.; and)	
CITIBANK,)	
<i>Defendants.</i>)	

ORDER

Pro se Plaintiff Dwayne E. Gray has filed this action against several Defendants, in which he claims violations of § 1983, the Truth-in-Lending Act, and various state causes of action. Although many motions are pending, this Order will only discuss Mr. Gray's Motion for Clerk's Entry of Default. [Dkt. 57.] In that motion, Mr. Gray seeks to have a default entered against Citibank; Chase Home Finance, LLC ("Chase"); and JT Property Services, Inc. [See *id.*] The Court **DENIES** Mr. Gray's motion for the following reasons:

- **Citibank**

As Mr. Gray's motion for default notes, the Court previously gave Citibank until January 26, 2012 to respond to Mr. Gray's Complaint. [Dkt. 33.] For reasons unknown, Citibank did not file its answer until April 4, 2012. [Dkt. 56.] The reasons are unknown because Citibank has failed to respond to the motion for Clerk's Entry of Default. Nonetheless, because no default has yet been entered; because the law prefers merits dispositions, see *Cracco v. Vitran Express, Inc.*, 559 F.3d 625, 631 (7th Cir. 2009); and because Citibank filed its motion to dismiss before Mr. Gray filed his motion for default, the Court will deny Mr. Gray's motion. At this point, Mr.

Gray has suffered no prejudice, so the Court will excuse Citibank's tardiness. *See* Fed. R. Civ. Pro. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

- **Chase**

As Mr. Gray's motion for default notes, the Court also gave Chase, until January 26, 2012 to respond to Mr. Gray's Complaint. [Dkt. 17.] For reasons unknown, Chase waited until February 9, 2012, to file its motion to dismiss. Again, because Chase has not responded to Mr. Gray's motion, the record contains no explanation for the delay. But because no default has yet been entered; because the law prefers merits dispositions, *see Cracco*, 559 F.3d at 631; and because Chase filed its motion to dismiss before Mr. Gray filed his motion for default, the Court will deny Mr. Gray's motion. Again, at this point Mr. Gray has suffered no prejudice, so the Court will excuse Chase's tardiness. *See* Fed. R. Civ. Pro. 61.

- **JT Property Services**

Mr. Gray's motion for default also argues that JT Property Services has failed to timely respond to the summons. As no extensions of time have been sought or received, the question of whether JT Property Services' pending motion to dismiss, [dkt. 60], is timely depends upon when it received service of the summons.

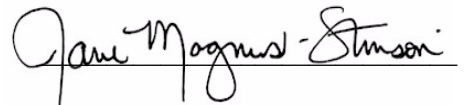
Mr. Gray previously filed a return of service on January 12, 2012. [Dkt. 29.] The return states both that Mr. Gray personally served the summons on JT Property Services on November 29, 2011 and that he sent it by certified mail on November 30, 2011. [*Id.* at 2-3.] Any personal service was, however, ineffective because Mr. Gray, as a party, may not personally serve a summons; a non-party must do it. Fed. R. Civ. Pro. 4(c)(2). And the return of service cannot establish proof of service by certified mail because the return only shows that the letter was sent, not

delivered; no signed return receipt has been filed. As he has failed to establish proper service, Mr. Gray has also failed to show that JT Property Services is late with its motion to dismiss.

Even if JT Property Services were late, however, the Court would decline to default JT Property Services in light of *Cracco*, 559 F.3d at 631 and Federal Rule of Civil Procedure 61.

The Motion for Clerk's Entry of Default [dkt. 57] is **DENIED**.

05/31/2012



Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Distribution via U.S. Mail:

DWAYNE E. GRAY
5567 West 43rd Street
Indianapolis, IN 46254

Distribution via ECF only:

Elizabeth J. Wysong Berg
GOODIN ABERNATHY LLP
eberg@goodinabernathy.com

Matthew W. Conrad
GEIGER CONRAD & HEAD LLP
matt.conrad@gch-law.com

Oni N. Harton
BOSE MCKINNEY & EVANS, LLP
oharton@boselaw.com

Deborah A. Kapitan
KOPKA PINKUS DOLIN & EADS LLC
dakapitan@kopkalaw.com

Richard M. Malad
COHEN & MALAD LLP

rmalad@cohenandmalad.com

Theodore J. Nowacki
BOSE MCKINNEY & EVANS, LLP
tnowacki@boselaw.com

Matthew D Snyder
KOPKA PINKUS DOLIN & EADS PC
mdsnyder@kopkalaw.com

TaKeena Monette Thompson
COHEN & MALAD, LLP
tthompson@cohenandmalad.com